Marquette Law Review

Volume 23
Issue 4 *June 1939*

Article 2

The New Federal Rules of Procedure as Compared with the Former Federal Equity Rules and the Wisconsin Code

Daniel C. Hopkinson

THE NEW FEDERAL RULES OF CIVIL PROCEDURE COMPARED WITH THE FORMER FEDERAL EQUITY RULES AND THE WISCONSIN CODE

DANIEL K. HOPKINSON

TO A considerable extent, the practice under the Federal Rules of Civil Procedure is the same as the practice under the Federal Equity Rules and the Wisconsin Code. There are, however, a great many minor and a few substantial differences. The lawyer who has tried suits in equity in the federal courts will be interested in knowing to what extent the practice under the Federal Rules of Civil Procedure conforms to the practice under the former Federal Equity Rules. The lawyer who has engaged in litigation in the Wisconsin courts or who has tried actions at law in the federal district courts in Wisconsin will examine the new federal rules with a view to determining the deviation from the Wisconsin practice. It was therefore considered that a digest of the Federal Rules of Civil Procedure would be of more practical usefulness if it included a comparison with the Equity Rules and the Wisconsin Code. A table of references to pertinent Wisconsin Statutes is set out at the conclusion of this article; a similar table of references to the Equity Rules is included in the published copies of the Federal Rules of Civil Procedure.

The Enabling Act of June 19, 1934, authorized the Supreme Court of the United States to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings and motions and the practice and procedure in civil actions at law, and to unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both. Pursuant to this authority, the Supreme Court in June, 1935, appointed an advisory Committee to prepare and submit to the Court a draft of a unified system of rules. With the aid and suggestions of members of the Bar, the Advisory Committee prepared a preliminary draft in May, 1936, a second draft in April, 1937, and a final report in November, 1937. The final report was accepted by the Supreme Court, and was submitted to Congress. Hearings were held before the judiciary committees of the House of Representatives and the Senate. Congress made no changes in the rules and they became effective on September

16, 1938, three months after the close of the regular session of Congress at which they were considered.

No procedure has been adopted for revision of the rules. The Advisory Committee suggested to the Supreme Court that a permanent committee be appointed to consider revisions. The Committee is of the opinion that the procedure with respect to revisions will be the same as the procedure which was followed in formulating these rules.

It was not intended that the Federal Rules of Civil Procedure should affect any substantive rights. There may be situations in which some contention might be made that the new rules invade the province of substantive law and are therefore beyond the scope of the Court's authority. It should be remembered, however, that the Supreme Court of the United States, which will ultimately decide any such question, was aware of this limitation when it promulgated these rules.

Regulation of the practice and procedure by the United States Supreme Court in suits in equity in the federal district courts is not new. Pursuant to the authority granted in 28 U.S.C.A. 730, 5 Stat. at L. 518, the Supreme Court in 1912 adopted the Equity Rules which have governed that practice. The practice and procedure in actions at law were governed by a combination of the federal statutes and the rules of the state in which each district court was held. The new rules have been derived from the federal statutes, the Equity Rules, the English rules, and the state codes. In the main, they have incorporated most of the substance of the Equity Rules. The more important change takes place in the supplanting of the diverse state practices which were formerly applicable under 28 U.S.C.A. 724.

The intention of the Committee was to provide a simple, unified system which would be governed by a single, brief body of rules. The Federal Rules of Civil Procedure do not, however, cover all situations. To the extent that the new rules, together with the federal statutes, do not regulate the practice and procedure, the district courts are permitted to formulate their own rules. It has been suggested that the Conformity Act has not been expressly repealed and that in any situation not covered by the new rules, the Conformity Act is still in effect and the state practice is to be followed. This position is based on the theory that the Enabling Act does not authorize the Supreme Court to delegate to the district courts the power to make rules. The Advisory Committee is of the opinion, however, that the Conformity Act has been totally superseded and that the district courts may make any necessary additional rules which are not inconsistent with the Federal Rules of Civil Procedure.

The Advisory Committee has elaborately annotated the new rules. The Committee points out that its opinion as to the interpretation to

be given to the rules has no greater force than the reasons on which that opinion is based, and could have no controlling weight with the courts. It is nevertheless undoubtedly true that the Committee's notes will generally be considered as strongly persuasive. The references in the annotations to statutes, rules, decisions, and state codes are, of course, of considerable value.

I. Scope of Rules—One Form of Action

Rule 1: Scope of Rules.

> "These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

Under this rule all laws and prior rules in conflict with the new rules are superseded and have no further force or effect.

The exceptions mentioned in this rule refer to certain proceedings named in Rule 81, such as bankruptcy, admiralty, citizenship, deportation and others, to which the new rules do not apply.

Rule 2: One Form of Action.

> "There shall be one form of action to be known as 'civil action'."

In intention and effect, this rule is identical with Wis. Stat. (1937) § 260.08, which abolishes "the distinction between actions at law and suits in equity, and the forms of all such actions and suits," and which provides for one form of action denominated a civil action. Rule 2 abolishes the procedural but not the substantive distinctions between actions at law and suits in equity.

II. Commencement of Action: Service of Process, Pleadings, Motions and Orders

Rule 3: Commencement of Action.

A civil action is commenced by filing a complaint with the court. This is the same as the practice under Equity Rule 12, extended to apply to actions at law.

In Wisconsin, a civil action is commenced by the service of the summons. Wis. Stat. (1937) §§ 262.01, 330.39 and 330.40.

Some question has been raised as to when a statute of limitations would be tolled under conflicting state and federal rules. It has been suggested that under Rule 3, statutes limiting the time within which actions may be commenced would be considered as limiting the time

within which the party may file the complaint, but that if the statute of limitations itself contained a contrary provision (e.g. that the summons must be served within the prescribed time), the statute of limitations would govern. This apparent conflict is probably obviated by Rule 4(a) which requires the clerk to issue the summons forthwith on the filing of the complaint.

Rule 4: Process.

The summons is issued forthwith by the clerk on the filing of the complaint. On request, additional summonses will be issued. If some defendants are not served, return should be made, and later additional summonses may be requested. This procedure is the same as that provided by Equity Rules 12 and 14 for issuance of subpoenas on the filing of a bill in equity. WIS. STAT. (1937) c. 262 permits the issuance and service of the summons before the complaint has been filed.

Service of process may be made by a United States marshal, his deputy, or some person specially appointed by the Court for that purpose. This is the same as Equity Rule 15. It should be noted that Rule 45 relating to service of subpoenas differs from Equity Rule 15 in that it permits service by a marshal, his deputy, or any person not a party and not less than 18 years old. In Wisconsin, service may be made by the sheriff of the county where the defendant may be found or by any other person not a party to the action. WIS. STAT. (1937) § 262.07.

Rule 4 requires that the summons and complaint be served together. WIS. STAT. (1937) § 262.05, permits service of the summons without the complaint.

Rule 4 prescribes the manner in which personal and substituted service may be made. This provision is considerably more elaborate than Equity Rule 13 and is generally similar to WIS. STAT. (1937) §§ 262.08-262.12. This rule also permits service on an individual other than an infant or an incompetent person and on a corporation, partnership or unincorporated association in the manner prescribed by any statute in the United States or in the manner prescribed by any law of the state in which the service is made.

All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. This is considered to be an enlargement of the former rule relative to service, but not an enlargement of the jurisdiction of the Court.

Failure to make proof of service does not affect the validity of the service. In its discretion, the Court may allow any process or proof of service to be amended.

Rule 5: Service and Filing of Pleadings and Other Papers.

This rule pertains to service of process after commencement of the action, and permits service on an attorney, service by mail, etc. It is similar to WIS. STAT. (1937) §§ 269.34, 269.37 and 269.42.

Rule 6: Time.

In computing any period of time, the first day is to be excluded, the last included. If the last day is a Sunday or legal holiday, the period runs until the end of the next day which is not a Sunday or holiday. This is an enlargement of Equity Rule 80.

Time within which an act is required or allowed may be enlarged by the court with or without motion or notice if the time has not expired, or on motion if the time has expired. WIS. STAT. (1937) § 269.45 provides for enlargement of time only on notice and on a showing of good cause.

The period of time provided for doing any act or taking any proceeding is not affected or limited by the expiration of a term of court. This provision does not extend the time otherwise limited for doing any act; it merely abolishes the arbitrary restriction which formerly prevented a party or the court from doing an act after the expiration of the term of court even though the time prescribed for the doing of such act had not otherwise expired. In Wisconsin, there are still some limitations based on the expiration of the term of court. WIS. STAT. (1937) § 252.10.

Written motions (other than motions which may be heard *ex parte*) and notice of hearing must be served not later than five days before the time of hearing. WIS. STAT. (1937) § 269.31 requires notice of motion to be served eight days before the time of hearing.

When a notice is served by mail, three days is added to the time prescribed for such notice. WIS. STAT. (1937) § 269.36 provides that when notice is served by mail, the time required or allowed shall be doubled.

III. PLEADINGS AND MOTIONS

Rule 7: Pleadings Allowed—Form of Motions.

The following pleadings may be used: complaint, answer, reply to a counterclaim, answer to a cross-claim, third party complaint, and third party answer. The court may order a reply to an answer or to a third party answer. Demurrers, pleas, and exceptions for insufficiency of pleadings are abolished. Statutes using the words "petition," "bill of complaint," "demurrer," or similar phrases are modified accordingly. The issues formerly raised by demurrers, pleas, or exceptions are now raised by pleadings or motions as prescribed in Rule 12. The

abolition of demurrers and pleas is not new to the federal equity practice, in which such pleadings were abolished by Equity Rule 29, but it alters the practice in actions at law.

The Wisconsin code provides for a complaint (§§263.02, 263.03), a demurrer or answer (§§263.05, 263.06, 263.13), a counterclaim (§263.14), a cross-complaint (§263.15), and a reply to a counterclaim (§§263.19, 263.20).

Rule 7 requires that an application to the court for an order be made by motion in writing, unless made during a hearing or trial.

The provisions of the Wisconsin code with respect to motions are somewhat more elaborate. WIS. STAT. (1937) §§ 269.27 and 269.32.

Rule 8: General Rules of Pleading.

A pleading which sets forth a claim for relief must contain (1) a short and plain statement of the grounds upon which the jurisdiction of the court depends, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment.

Defenses to each claim must be stated in short and plain terms. A general denial may be used only if the pleader intends to controvert all issues. Affirmative defenses and matter constituting an avoidance must be pleaded. Two or more statements of a claim or defense may be pleaded alternatively or hypothetically. A party may state as many separate legal or equitable claims or defenses as he has, whether they are consistent or not.

This rule is an elaboration of Equity Rules 18, 25, 30 and 31. It is substantially the same as the provisions of WIS. STAT. (1937) c. 263 except that in Wisconsin the general denial is not permitted. WIS. STAT. (1937) § 263.13.

Rule 9: Pleading Special Matters.

It is not necessary to aver the capacity of a party to sue or to be sued, except to the extent required to show the jurisdiction of the court. The Wisconsin practice differs in that WIS. STAT. (1937) § 263.13(4) requires that corporate existence be pleaded in actions by or against corporations.

Averments of fraud or mistake must be stated with particularity. Malice, intent, knowledge, etc. may be averred generally. The performance or occurrence of conditions precedent may be averred generally. The same rule is embodied in WIS. STAT. (1937) § 263.34.

In pleading a judgment or decision of a domestic or foreign court or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing juris-

diction to render it. This is the same as WIS. STAT. (1937) § 263.33, but is expanded to include judgments of administrative tribunals and foreign courts.

Rule 10: Form of Pleadings.

This rule prescribes the form in which pleadings must be drafted. It is more elaborate than the similar provisions in Equity Rule 25 and WIS. STAT. (1937) §§ 263.03 and 269.33.

Rule 11: Signing of Pleadings.

In general, pleadings need not be verified or accompanied by an affidavit, except when statutes so require. Rule 11 expressly continues such statutes. If the party is represented by an attorney, the attorney is required to sign the pleading in his individual name. Such signature constitutes a certificate by the attorney that, to the best of his knowledge and belief, there is good ground to support the pleading, and that it is not interposed for delay. A pleading not signed, or one signed with intent to defeat this rule, may be stricken and the attorney may be subjected to disciplinary action. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished.

Rule 11 is substantially the same as Equity Rules 21 and 24. WIS. STAT. (1937) § 263.23 requires that every pleading be subscribed by the party or his attorney. Under § 263.24 every pleading except a demurrer must be verified but the verification may be omitted when an admission of the allegations might subject the party to prosecution for a felony.

Rule 12: Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.

The time within which answer to a complaint or a cross-claim, or a reply to a counterclaim may be served is limited to twenty days after the service of the pleading to which it is responsive. A similar time limit of twenty days is imposed by WIS. STAT. (1937) §§ 263.05, 263.17 and 263.20. Equity Rule 12 allowed twenty days for the filing of an answer, but Equity Rule 31 allowed only ten days for the filing of a reply.

Every defense may be asserted in a pleading, but the following may be made by motion:

(1) Lack of jurisdiction over the subject matter.

(2) Lack of jurisdiction over the person.

(3) Improper venue.
(4) Insufficiency of process.
(5) Insufficiency of service of process.
(6) Failure to state a claim upon which relief can be granted.

The proper motion to raise these issues would be a motion to dismiss. Both a motion for judgment on the pleadings and a motion to dismiss may be heard before trial.

Rule 12 provides for a motion for a more definite statement or a bill of particulars and for a motion to strike redundant, immaterial, impertinent, or scandalous matter from a pleading. These provisions are similar to Equity Rules 20 and 21. The Wisconsin code also provides for a motion for a bill of particulars (§ 263.32) and for a motion to strike matter from a pleading (§§ 263.42, 263.43 and 263.44).

Motions may be consolidated and, with certain exceptions, all motions must be made at the same time. When a jurisdictional question is raised, it is not necessary to enter a special appearance and obtain a ruling on the question of jurisdiction before proceeding with other defenses. The appropriate defenses may be consolidated in a single motion; if the court makes an adverse ruling on the jurisdictional question, the parties may proceed to trial, and the objections interposed by the motion are sufficiently preserved for the purpose of appeal.

Rule 13: Counterclaim and Cross-Claim.

The pleader must interpose as a counterclaim any claim not the subject of another pending action which he has against an opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court can not acquire jurisdiction. This is substantially Equity Rule 30 broadened to include legal as well as equitable counterclaims. The pleader may state as a counterclaim any claim against an opposing party although it does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim. If the action proceeds to judgment without the interposition of a compulsory counterclaim, such counterclaim is barred but the failure to plead a counterclaim may be cured by an amendment by leave of court at any time before judgment. A pleader may state as a cross-claim any claim against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein.

It has been suggested that there is a conflict between the provisions relating to compulsory counterclaims and the holding that a defendant in a suit in equity can not be compelled to set up a legal counterclaim

so as to deprive him of his right to a jury trial on his claim at law. This apparent conflict is resolved by Rule 42 which permits a separation of issues with trial of equitable issues by the court and legal issues by a jury.

In Wisconsin, a counterclaim may be asserted (a) if it arises out of a cause of action or transaction or occurrence set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action; (b) in an action arising on contract, if it arises out of any other contract and exists at the commencement of the action; or (c) against a nonresident plaintiff, if the cause of action arises within the state and exists at the commencement of the action. WIS. STAT. (1937) § 263.14. A cross-complaint may be asserted if the relief sought involves or in some manner affects the contract, transaction or property which is the subject matter of the action or relates to the occurrence out of which the action arose. WIS. STAT. (1937) § 263.15.

Rule 14: Third-Party Practice.

A plaintiff against whom a counterclaim has been asserted or a defendant may move for leave to serve a summons and complaint on a person not a party to the action who may be liable to him. Rule 13 authorizes the court to order such third parties to be brought in as defendants.

WIS. STAT. (1937) §§ 260.19 and 160.20, which provide for third party impleader, are somewhat broader than Rule 14.

Rule 15: Amended and Supplemental Pleadings.

This rule permits very liberal amendment of pleadings and allows the use of supplemental pleadings. It incorporates the substance of Equity Rules 19, 28, 32, 34, and 35.

The Wisconsin code also contains liberal provision for amendments of pleadings. WIS. STAT. (1937) §§ 263.28, 263.45, 263.47, 269.44 and 269.52.

Rule 16: Pre-Trial Procedure; Formulating Issues.

In any action the court may order the attorneys to appear and confer relative to the possibility and necessity of simplifying the issues, amending the pleadings, obtaining admissions to avoid unnecessary proof, limiting the number of expert witnesses, or any other matters which might aid in the disposition of the action. This procedure is in the discretion of the court, since the court is not required to call such a conference. The issues can be simplified, proof limited, etc., only to the extent that counsel agree thereto. This practice is new

in the federal system. It is entirely different from the conciliation technique used by some courts in Wisconsin which is directed toward settlement of the action rather than toward making the trial less burdensome and expensive. The Wisconsin conciliation proceedings are carried on without express statutory direction, and are of course successful only if the parties can reach an agreement.

IV. PARTIES

Rule 17: Parties Plaintiff and Defendant; Capacity.

Every action shall be prosecuted in the name of the real party in interest. This rule is based on Equity Rules 37 and 70, and is essentially the same as the rule and exceptions in WIS. STAT. (1937) §§ 260.13, 260.15, and 260.22.

Capacity to sue or be sued is to be determined as follows:

(1) Individual—determined by law of his domicile. (Capacity can not be determined by the law of the forum since in the federal courts there is no law of forum as such.)

(2) Corporation—determined by law under which it was organized.

(3) All other cases—determined by law of the state in which the district court is held except that a partnership or other unincorporated association, which has no capacity by the law of such state, may sue or be sued in its common name to enforce a substantive right existing under the Constitution or laws of the United States.

In this connection, WIS. STAT. (1937) § 260.21 relating to suit by a fictitious name when the name of an individual defendant or the names of members of a partnership are unknown is pertinent.

Rule 17 is intended to embody the present law relating to the determination of capacity to sue or be sued. It is not expected that the substantive rights of the parties will be altered. At the time of the hearings on these rules and particularly at the hearings before the Judiciary Committee of the House of Representatives, considerable objection was raised to Rule 17. It was contended that this rule would permit suits to be brought against unincorporated associations which previously did not have capacity either to sue or to be sued, and that corporations could escape suit if the law of the state in which such corporations were organized so provided. The Advisory Committee took the position that Rule 17 neither gives to a party nor takes away from it the capacity to sue or be sued, but merely expresses the present general rule as to what law shall be applied in determining whether or not the party has such capacity.

Rule 18: Joinder of Claims and Remedies.

This rule permits practically unlimited joinder of claims, subject to the rule that the court may order claims tried separately to avoid confusion, and subject also to the rule that jurisdiction and venue are not to be affected. Rule 18 is patterned on Equity Rule 26, extended to include multiple parties. The intention is that in a single action a party should have all the relief to which he is entitled regardless of whether it is legal or equitable or both. This rule is broader than WIS. STAT. (1937) § 263.04, which permits the plaintiff to unite several causes of action only when they each affect all parties to the action.

Rule 19: Necessary Joinder of Parties.

Persons having a joint interest must be made parties and be joined on the same side as plaintiffs or defendants, but when a person who should join as a plaintiff refuses to do so, he may be made a defendant or an involuntary plaintiff. The court in its discretion may proceed without making such persons parties if jurisdiction over them can not be acquired or if joinder would deprive the court of jurisdiction of the parties before it. This rule contains the substance of Equity Rules 35, 37, 39, and 42.

WIS. STAT. (1937) § 260.12 requires that parties who are united in interest be joined as plaintiffs or defendants, and allows joinder as a defendant of any party who should be a plaintiff but whose consent can not be obtained.

Rule 20: Permissive Joinder of Parties.

This rule provides for permissive joinder of parties in favor of whom or against whom rights are asserted arising out of the same transaction, occurrence or series of transactions or occurrences, if any question of law or fact common to all of them will arise in the action. The court may order special trials or make other orders to prevent delay or prejudice. This rule is a moderate expansion of Equity Rules 26, 37, 40 and 42.

WIS. STAT. (1937) § 260.10 permits joinder as plaintiffs of all persons "having an interest in the subject of the action and in obtaining the relief demanded." WIS. STAT. (1937) § 260.11 permits joinder as defendants of all persons who have or claim "an interest in the controversy adverse to the plaintiff" or who are necessary parties to a complete determination or settlement of the questions involved.

Rule 21: Misjoinder and Non-Joinder of Parties.

Misjoinder of parties is not ground for dismissal. Parties may be dropped or added by order of the court at any stage of the action. Any claim may be severed and proceeded with separately.

This rule is much more liberal than Equity Rules 43 and 44.

Rule 22: Interpleader.

Persons having claims against the plaintiff or defendant may be joined as defendants and required to interplead when their claims are such that the plaintiff or defendant may be exposed to double or multiple liability. This rule is the same in effect as WIS. STAT. (1937) § 260.19 and supplants the old restrictions on equitable interpleader. It permits joinder in the alternative. The same result could probably be accomplished under Rule 20 relating to permissive joinder.

Rule 23: Class Actions.

Subdivision (a) of this rule embodies the provisions of Equity Rule 38, in which the test to be applied to representative suits was that the question should be "one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court." Rule 23 attempts to define what constitutes a "common or general interest." Representative suits in Wisconsin are governed by WIS. STAT. (1937) § 260.12, which contains the following: "When the question is one of a common or general interest of many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole."

Subdivision (b) prescribes the procedure for actions by shareholders, and is substantially the same as Equity Rule 27.

Rule 24: Intervention.

This rule defines the absolute and discretionary rights of intervention, and prescribes the procedure therefor. It is intended as a clarification of Equity Rule 37. The following clause in Equity Rule 37 was intentionally omitted: "The intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding." The Advisory Committee considered that such language was more confusing and misleading than helpful.

Rule 25: Substitution of Parties.

In the event of the death or incompetency of a party, transfer of interest, or death or separation from office of a public officer, proper parties may be substituted and the action may be continued. The same rights are available under WIS. STAT. (1937) §§ 269.13-269.18.

VI. Depositions and Discovery

This section of the Federal Rules of Civil Procedure presents an important innovation in federal practice. The new rules provide for the taking of depositions for the purpose of discovery; the old rules were designed to permit the taking of depositions only for the purpose of proof. Equity Rule 58, the only rule in the federal system providing a means for discovery, was restricted to written interrogatories, and was limited in its scope to the case of the party seeking the discovery. The new procedure for discovery reflects the spirit with which the Advisory Committee approached the entire problem of federal procedure. The Committee has attempted to minimize the detail in the pleadings and to discourage the use of the motion for a bill of particulars or for a more definite statement. The intention is to limit the pleadings to the simplest possible form and to permit the adverse party to obtain whatever information he needs by means of discovery rather than through the pleadings.

Rule 26: Depositions Pending Action.

The testimony of any person, whether a party or not, may be taken at the instance of any party by deposition on oral examination or on written interrogatories for the purpose of discovery or for use as evidence or for both purposes. Unless restricted as provided in Rule 30, the scope of the deposition is virtually unlimited. The restriction is not in the taking of the deposition, but in the use which may be made of it. Restrictions as to use of depositions are practically the same as those previously provided for depositions taken *de bene esse,* except that the court may permit further use of a deposition on a finding of exceptional circumstances which make such use desirable.

The Wisconsin code permits extensive use of depositions for the purpose of both discovery and proof. The pertinent provisions are contained in Wis. Stat. (1937) §§ 269.57, 326.05, 326.07, 326.12-326.16 and 326.26.

Rule 27: Depositions Before Action or Pending Appeal.

This rule is intended to provide a simple method for the taking of depositions to perpetuate testimony before action or while an appeal is pending. Either federal or state procedure may be used. The Wisconsin procedure for perpetuation of testimony is prescribed in Wis. Stat. (1937) §§ 326.27-326.29.

Rule 28: Persons Before Whom Depositions May Be Taken.

Depositions may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the

examination is held. WIS. STAT. (1937) §§ 325.04, 326.01, and 326.09 list the officers before whom depositions may be taken.

Rule 29: Stipulations Regarding the Taking of Depositions.

The parties may stipulate as to the place or manner of taking depositions.

Rule 30: Depositions Upon Oral Examination.

This rule prescribes the method for taking depositions on oral examination. It is substantially the same as Equity Rules 49-55, with the addition of provisions for the protection of parties and witnesses (e.g. order to terminate examination, limit its scope, etc.). These protective provisions were incorporated because of the unlimited right of discovery given by Rule 26. A similar procedure is contained in WIS. STAT. (1937) §§ 326.09 and 326.10.

Rule 31: Depositions of Witnesses Upon Written Interrogatories.

This rule prescribes the method for taking depositions on written interrogatories and includes protective provisions similar to those embodied in Rule 30.

Rule 32: Effect of Errors and Irregularities in Depositions.

This rule prescribes the manner by which and time within which objections may be taken as to notice of taking deposition, disqualification of officer, manner or form of deposition, competency of witnesses or competency, relevancy, or materiality of testimony, and completion and return of the deposition. In general, errors and irregularities in depositions are waived unless objection is made at the earliest practicable time.

Rule 33: Interrogatories to Parties.

This rule provides for the submission of written interrogatories directly to an adverse party. It is largely a restatement of Equity Rule 58.

Rule 34: Discovery and Production of Documents and Things for Inspection, Copying, or Photographing.

The court may order a party to produce and permit the inspection and copying of documents, papers, books, objects, etc. This rule should be read in connection with the rules relating to discovery. Under Rule 26 a party can discover the existence, condition, custody and location of such objects and then can get an order of the court requiring that they be produced. A subpoena commanding the production of documentary evidence may be obtained but only on order of the court.

WIS. STAT. (1937) § 269.57 similarly authorizes the court to order a party to provide an opportunity for inspection of property or for inspection and copying of books and documents containing evidence relating to the action.

Rule 35: Physical and Mental Examination of Persons.

In an action in which the mental or physical condition of a party is in controversy, the court may order the party to submit to an examination by a physician.

Rule 36: Admission of Facts and of Genuineness of Documents.

This rule permits a party to demand that the adverse party admit the genuineness of documents or the truth of matters of fact. Such matters will be deemed admitted unless within ten days the adverse party denies specifically the matters of which an admission is requested or states in detail the reasons why he can not truthfully admit or deny such matters. This rule is broader than Equity Rule 58. A similar procedure is prescribed in WIS. STAT. (1937) § 327.22.

Rule 37: Refusal to Make Discovery—Consequences.

This rule prescribes the penalties for failure of a deponent to answer oral or written interrogatories.

VI. TRIALS

Rule 38: Jury Trial of Right.

The right of trial by jury as declared by the seventh amendment to the Constitution or as given by a statute of the United States is expressly preserved, but demand for a jury trial must be made not later than ten days after service of the last pleading directed to the issue to be tried. Failure to serve and file a demand constitutes a waiver. Some contention has been made that the right to trial by jury is not preserved within the meaning of the United States Constitution if the party is required to do an affirmative act in order to avoid being deprived of that right. The seriousness of this objection is doubtful, however, in view of the fact that similar provisions in state codes have been upheld.

In Wisconsin justice court practice, a party waives his right to a jury trial unless he not only makes a demand for a jury before commencement of the trial, but also pays a jury fee. WIS. STAT. (1937) § 302.04. The right to trial by jury in actions in the circuit court is preserved by WIS. STAT. (1937) § 270.07, which provides that trial by jury may be waived only by the express consent of the parties.

Rule 39: Trial by Jury or By the Court.

When trial by jury has been demanded in accordance with Rule 38, the trial of all issues so demanded shall be by a jury unless the parties or their attorneys consent to trial by the court or unless the court finds that the right of trial by jury does not exist under the Constitution or statutes of the United States. Issues not demanded for trial by jury shall be tried by the court, but the court may, in its discretion, order a trial by jury of any or all issues. The court may try any issue with an advisory jury.

WIS. STAT. (1937) § 270.07 provides for the submission of issues of fact to the jury when a jury trial has not been waived.

Rule 40: Assignment of Cases for Trial.

The court may provide by rule for placing actions on the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the court deems expedient.

WIS. STAT. (1937) § 270.13 permits either party to bring an action to trial by serving a notice of trial.

Rule 41: Dismissal of Actions.

An action may be dismissed by the plaintiff without order of court by filing a notice of dismissal before service of the answer or by filing a stipulation of dismissal signed by all parties who have appeared. Such dismissal is without prejudice, except that a notice of dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court an action based on or including the same claim. Subsequent to the service of an answer and without a stipulation, the action may be dismissed without prejudice at the plaintiff's request only on order of the court and on such terms as the court deems proper.

The action may be dismissed if the plaintiff fails to comply with these rules or any order of the court. Unless otherwise specified, such dismissal operates as an adjudication on the merits.

If the plaintiff has put in his case, the defendant may move for dismissal without waiving his right to offer evidence if the motion is not granted. This rule should be read in connection with Rule 50 which permits either party to move for a directed verdict at the close of the evidence offered by an opponent, without waiving the right to proceed if the motion is denied and without waiving the right to trial by jury.

Rule 42: Consolidation; Separate Trials.

The court may order a joint trial of any or all matters in issue in pending actions involving a common question of law or fact. The court may order such actions consolidated or may make such other orders as would avoid unnecessary delay or costs. The court may order separate trials of any claims or issues.

In Wisconsin two or more actions pending in the same court which might have been joined may be consolidated. WIS. STAT. (1937) § 269.05. The court in its discretion may separate issues for the purpose of trial. WIS. STAT. (1937 § 270.08.

Rule 43: Evidence.

In all trials, the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. This is similar to Equity Rule 46. This section, however, abolishes in patent and trademark cases the practice under Equity Rule 48 of setting forth in affidavits the testimony of expert witnesses directed to matters of opinion.

Evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. The most favorable rule relating to the reception of evidence governs. The same rule is applied to competency of witnesses. The effect of this rule is to prevent the excluson of evidence which would be admissible in a state court in similar circumstances.

A party may examine adversely an unwilling or hostile witness, an adverse party or an officer, director, or managing agent of a corporation, partnership, or association which is an adverse party, and may contradict such testimony and impeach such witness.

The Wisconsin code contains a similar provision. WIS. STAT. (1937) § 325.14 permits adverse examination of "any party or any person for whose immediate benefit any civil action or proceeding is prosecuted or defended; or his or its assignor, officer, agent or employee, or the person who was such officer, agent or employee at the time of the occurrence of the facts made the subject of the examination."

Rule 44: Proof of Official Record.

Under the former rules almost as many different methods of proof of official records were required as there were departments of government. Under Rule 44, any of the former methods of proof may

be used, but the simple unified procedure prescribed in this rule is available in any case in lieu thereof.

WIS. STAT. (1937) § 327.18 prescribes the method to be used in proving official records.

Rule 45: Subpoena.

A subpoena may be served by the marshal, his deputy, or any other person who is not a party and is not less than 18 years of age.

A subpoena may command the production of books, papers or documents. On motion made before the time specified in the subpoena for compliance therewith, the court may quash the subpoena if it is unreasonable and oppressive, or the court may require the party in whose behalf the subpoena is issued to advance the reasonable cost of producing the books, papers or documents.

A subpoena commanding production of documentary evidence on the taking of a deposition shall be used only on order of the court. A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county where he resides or is employed or transacts his business. A non-resident may be required to attend only in the county where he is served with a subpoena, or within forty miles from the place of service, or at such other place as is fixed by order of the court.

A subpoena requiring attendance of a witness at a trial may be served at any place within the district, or at any place without the district that is within one hundred miles of the place of trial, or elsewhere on order of the court when authorized by statute. Failure to obey a subpoena may be deemed a contempt of court.

The provision relating to service of subpoenas is broader than Equity Rule 15 which required that service be made by the marshal, his deputy or some other person specially appointed by the court. The provision relating to the effect of failure to obey a subpoena is substantially the same as Equity Rule 52.

Rule 45 does not apply to the enforcement of subpoenas issued by administrative officers and commissions pursuant to statutory authority; it therefore does not affect the provisions of 35 U.S.C.A. 54-56 (1935) relating to subpoenas issued in patent office proceedings.

In Wisconsin a subpoena may be served by any person. WIS. STAT. (1937) § 325.03. A great many officers are authorized by WIS. STAT. (1937) § 325.01 to issue subpoenas, among them any judge, clerk of a court, court commissioner, justice of the peace, the attorney general, any district attorney, certain designated city and county officials, and others.

Rule 46: Exceptions Unnecessary.

Formal exceptions to rulings and orders of the court are unnecessary; it is sufficient if a party makes known to the court the action he desires the court to take or his objection to the action of the court. WIS. STAT. (1937) § 270.39 similarly removes the necessity for formal exceptions.

Rule 47: Jurors.

The examination of prospective jurors shall be by the parties or their attorneys or by the court supplemented by the parties or their attorneys. One or two jurors may be impanelled as alternate jurors, to replace jurors who become unable or disqualified to perform their duties.

WIS. STAT. (1937) §§ 270.15 and 270.16 prescribe the procedure for drawing the jury. Either party in person or through attorneys has the right to examine any person called as a juror; the court may also take part in such examination. Any party objecting to a juror may introduce evidence in support of his objection.

Rules 48: Juries of Less Than Twelve—Majority Verdict.

The parties may stipulate that the jury may consist of a number less than twelve or that a verdict or finding of a stated majority of the jurors shall be taken as a verdict or finding of the jury.

WIS. STAT. (1937) §§ 270.15 and 270.25 provide that the parties may agree on a jury of less than twelve and that a verdict agreed to by five-sixths of the jurors shall be the verdict of the jury.

Rule 49: Special Verdicts and Interrogatories.

The court may require the jury to return a special verdict or to answer written interrogatories. The court shall give the jury such explanation and instruction as may be necessary. If the court fails to submit to the jury any issue of fact raised by the pleadings or the evidence, each party waives his right to a trial by jury of such issue unless he demands its submission before the jury retires. Answers to written interrogatories control over an inconsistent general verdict.

WIS. STAT. (1937) § 270.27 provides that the court may direct the jury to find a special verdict and shall do so when requested by either party before the introduction of testimony in his behalf.

WIS. STAT. (1937) § 270.28 is the same in effect as Rule 49 relative to waiver of jury trial on failure to request submission of an omitted issue. Under § 270.30, a special finding of facts is controlling over an inconsistent general verdict.

Rule 50: Motion For a Directed Verdict.

A motion for a directed verdict made at the close of the evidence offered by an opponent is not a waiver of the right to offer evidence in the event that the motion is not granted, and is not a waiver of trial by jury even though all parties have moved for directed verdicts. No express reservation of rights against waiver is necessary, A motion for a directed verdict must state the specific grounds therefor.

In Wisconsin when all parties without reservation move for a directed verdict, such motion is equivalent to a stipulation by the parties waiving jury trial and submitting the entire case to the court. WIS. STAT. (1937) § 270.26.

Rule 51: Instructions to Jury—Objection.

At or before the close of the evidence, any party may file a written request for instructions to the jury. The court shall inform counsel of its proposed action prior to arguments to the jury. Objection to failure of the court to give an instruction is waived unless such objection is asserted before the jury retires.

WIS. STAT. (1937) § 270.21 provides that requests for instructions must be submitted in writing before the argument to the jury. Instructions given by the court must be reduced to writing.

Rule 52: Findings by the Court.

In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law. In granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. A request for findings is not necessary for the purpose of review. Findings of fact shall not be set aside unless clearly erroneous. The findings of a master, adopted by the court, shall be considered as the findings of the court. On motion made not later than ten days after judgment, the court may amend or supplement its findings and amend the judgment.

With respect to findings of fact and conclusions of law, this rule is a restatement of Equity Rule 70½. In Wisconsin on a trial of an issue of fact by the court, the decision of the court must be given in writing and must state separately the facts found and the conclusions of law. WIS. STAT. (1937) § 270.33.

Rule 53: Masters.

Standing or special masters may be appointed by the court. Reference to a master shall be the exception. The parties may procure the attendance of witnesses before the master by issuance and service of

subpoenas as provided in Rule 45. The master shall prepare a report and if required shall make findings of fact and conclusions of law. In non-jury actions the court shall accept the master's findings of fact unless they are clearly erroneous. On motion and after hearing the court may adopt, modify or reject the report, receive further evidence or recommit the matter to the master. In jury actions the master's findings are admissible as evidence. This rule embodies substantially all of Equity Rules 49, 51-53, 59-63, and 65-68, extended to apply to actions at law.

Under WIS. STAT. (1937) § 270.34 all or any issues may be referred on the written consent of the parties, except in actions for divorce or annulment of marriage. On application of either party or of its own motion the court may direct a reference when the trial of an issue of fact requires the examination of a long account or when the taking of an account is necessary for the information of the court before judgment or for carrying a judgment into effect. Under WIS. STAT. (1937) § 270.35 the trial by the referee shall be conducted in the same manner as the trial by the court. The referee must state the facts found and the conclusions of law separately and report his findings to the court. The court may review such report and on motion may enter judgment thereon or set aside, alter or modify the report or enter judgment accordingly, or require the referee to amend his report.

VII. JUDGMENT

Rule 54: Judgments—Costs.

The word "judgment" as used in these rules includes decrees and orders from which an appeal lies. When more than one claim for relief is presented in an action, the court may enter judgment as to any such claim at any stage of the proceedings; the action shall then proceed with respect to the remaining claims. The court by order may stay enforcement of such judgment pending the determination of the remaining claims. A default judgment shall not differ from or exceed the amount demanded in the pleadings. Every final judgment which is not a default judgment shall grant the relief to which the party is entitled, even if such relief has not been demanded in the pleadings. Costs shall be allowed as of course to the prevailing party unless the court otherwise directs and may be taxed by the clerk on one day's notice.

WIS. STAT. (1937) § 270.54 similarly provides for the entry of judgment against or in favor of one or several defendants, and for continuance of the action against the others. WIS. STAT. (1937) c. 271 contains elaborate provisions relative to costs.

Rule 55: Default.

When a party has failed to plead or otherwise defend and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default. When the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, the clerk may enter a default judgment. In all other cases, a default judgment may be entered only upon application to the court. The court may conduct such hearings or order such references as it deems necessary and proper. For good cause shown, the court may set aside an entry of default or a default judgment in accordance with Rule 60. This rule embodies Equity Rules 12, 16, 17, 29 and 31.

WIS. STAT. (1937) § 270.62 provides for the entry of a default judgment by the clerk in actions on contract without proof if the complaint is verified and with proof if the complaint is not verified, and for entry of a default judgment by the court on the taking of proof in all other actions.

Rule 56: Summary Judgment.

Summary judgment may be entered in favor of a party seeking to recover on a counterclaim or a cross-claim or to obtain a declaratory judgment or in favor of a party against whom such claim is asserted. Either with or without supporting affidavits, motion for summary judgment must be served at least ten days before the time specified for hearing. A judgment shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, show that except as to the amount of damages there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. On such motion, the court may determine some of the issues and direct further proceedings as to the remaining issues. If it should appear to the satisfaction of the court that any affidavits in support of such motion are presented in bad faith or solely for the purpose of delay, the court shall order the party employing them to pay to the other party the reasonable expenses which the proceedings have caused him to incur and any offending party or attorney may be adjudged guilty of contempt.

WIS. STAT. (1937) § 270.635 designates the situations in which summary judgment may be entered. The judgment may be entered in favor of either party.

Rule 57: Declaratory Judgments.

The procedure for obtaining a declaratory judgment pursuant to § 274(d) of the Judicial Code as amended, 28 U.S.C.A. 400 (1935) shall be in accordance with these rules. The existence of another ade-

quate remedy does not preclude a judgment for declaratory relief in cases when it is appropriate. This rule does not attempt to describe the situations in which declaratory relief would be proper. It does, however, indicate that declaratory relief may be alternative or cumulative and is not exclusive or extraordinary. The notes of the Advisory Committee contain rather extensive references to authorities which would be helpful in determining any issues raised in connection with this subject.

WIS. STAT. (1937) § 269.56 sets out in considerable detail the rules which are to be applied to actions for declaratory relief.

Rules 58: Entry of Judgment.

Unless the court otherwise directs, judgment on the verdict of a jury shall be entered forthwith by the clerk. The court shall direct the appropriate judgment to be entered on a special verdict or upon a general verdict accompanied by answers to interrogatories. Notation of a judgment in the civil docket constitutes entry of the judgment, which is not effective before such entry.

The same procedure with somewhat greater elaboration is contained in WIS. STAT. (1937) §§ 270.31, 270.63 and 270.65.

Rule 59: New Trials.

A new trial may be granted in jury actions for any of the reasons for which new trials have heretofore been granted in actions at law and in non-jury actions for any of the reasons for which rehearings have heretofore been granted in suits in equity. In non-jury actions the court may open the judgment, take additional testimony, amend or make new findings of fact and conclusions of law, and direct entry of a new judgment. Motion for a new trial must be served not later than ten days after entry of judgment, except that a motion based on newly discovered evidence may be made with leave of court at any time before the expiration of the time for appeal. If supporting affidavits are used, they must be served with the motion and the opposing party has ten days within which to serve opposing affidavits. Such time may be extended for a period not exceeding twenty days. The court may of its own initiative order a new trial not later than ten days after entry of judgment. This rule embodies the substance of Equity Rule 69 and 28 U.S.C.A. 391 (1935).

In Wisconsin the trial judge may, within sixty days after the verdict is rendered, entertain a motion to set aside the verdict and grant a new trial because the verdict is contrary to law and to the evidence, or for excessive or inadequate damages or in the interest of justice. WIS. STAT. (1937) § 270.49.

Rule 60: Relief from Judgment or Order.

Clerical mistakes in judgments, orders or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time. On motion made within six months, the court may relieve a party from a judgment, order or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. Such motion does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of the court to entertain an action to relieve a party from a judgment, order or proceeding or to set aside within one year a judgment obtained against a defendant not actually personally notified. The portion of this rule relating to clerical mistakes is the same as Equity Rule 72.

In Wisconsin the court may, at any time within one year after notice thereof, relieve a party from a judgment, order, stipulation or other proceeding against him obtained through his mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding. WIS. STAT. (1937) § 260.46.

Rule 61: Harmless Error.

No error is ground for granting a new trial or for setting aside a verdict or disturbing a judgment or order unless refusal to take such action appears to the court inconsistent with substantial justice. The court must disregard any error or defect in proceedings which does not affect the substantial rights of the parties.

This rule is in accord with Equity Rules 19, 46, and 72. WIS. STAT. (1937) § 269.43 provides that the court shall disregard any error or defect in the pleadings which does not affect the substantial rights of the adverse party.

Rule 62: Stay of Proceedings to Enforce a Judgment.

No proceedings may be taken for the enforcement of a judgment until ten days after its entry, except that this rule does not apply to a judgment in an action for an injunction or in a receivership action or a judgment or order directing an accounting in an action for infringement of letters patent. The court may stay proceedings to enforce a judgment pending the disposition of motions relating thereto. On such terms as it considers proper, the court may suspend, modify, restore or grant an injunction during the pendency of an appeal. By giving a supersedeas bond the appellant may stay the enforcement of a judgment while an appeal is pending. In any state in which a judgment is a lien on property and in which the judgment debtor is entitled to a stay of execution, the judgment debtor is entitled to such stay as would be accorded him had the action been maintained in the state court.

The provisions of this rule do not limit the powers of the appellate court to stay proceedings. The portion of this rule relating to injunctions embodies the substance of Equity Rule 74.

WIS. STAT. (1937) § 270.79 provides that a judgment is a lien on the real property of the judgment debtor in the county where docketed, and that when an appeal is pending, bond has been given and the notation "secured on appeal" has been entered on the docket, the lien shall cease during the pendency of the appeal. Such lien could therefore be similarly suspended under the federal practice in Wisconsin.

Rule 63: Disability of a Judge.

If a judge before whom the action has been tried is unable to perform his duties by reason of death, sickness or other disability after a verdict is returned or findings of fact and conclusions of law are filed, any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties. If such other judge is satisfied that he can not perform those duties because he did not preside at the trial or for any other reason, he may grant a new trial.

VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

Rule 64: Seizure of Person or Property.

The remedy for seizure of a person or property for the purpose of securing satisfaction of the judgment ultimately to be rendered in the action is available as provided by the law of the state in which the district court is held, existing at the time the remedy is sought, except that any existing statute of the United States governs to the extent to which it is applicable and that the action shall be prosecuted pursuant to these rules.

The notes of the Advisory Committee list the applicable United States statutes relative to attachment, garnishment, arrest and replevin. In applying the state law, it is necessary, of course, to refer to WIS. STAT. (1937) c. 264 (arrest), c. 265 (replevin), c. 266 (attachment), c. 267 (garnishment) and whatever other statutes are appropriate to determine the extent of the remedies which may be available.

Rule 65: Injunctions.

No preliminary injunction shall be isued without notice. No temporary restraining order shall be granted without notice unless it clearly appears that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had. A temporary restraining order shall expire within a period not exceeding ten days unless extended by the court. If a temporary restraining order is granted without notice, the motion for a prelimi-

nary injunction shall be heard at the earliest possible time. On two days' notice, or less with leave of court, the adverse party may move for dissolution of a temporary restraining order. No restraining order or preliminary injunction shall issue except on the giving of security for the payment of costs and damages. Every injunction and restraining order shall set forth the reasons for its issuance, shall be specific in its terms and shall describe in detail the acts to be restrained. These rules do not modify the following statutes: 38 STAT. 730, 29 U.S.C. 52, 53 and 47 STAT. 70, 29 U.S.C. c. 6, relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; 28 U.S.C. 41 (26) relating to preliminary injunctions in actions of interpleader; or Act of August 24, 1937, c. 754, § 3, relating to actions to enjoin acts of Congress. Other statutes which are not affected by these rules are listed in the notes of the Advisory Committee.

Rule 65 is largely a reenactment of the present statutory Rule 73. The rules relating to injunctions in Wisconsin are contained in WIS. STAT. (1937) c. 268.

Rule 66: Receivers.

The practice in the administration of estates by receivers or similar officers shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts. All appeals in receivership proceedings are subject to the new rules.

The Wisconsin practice relating to receivers is set out in WIS. STAT. (1937) c. 268.

Rule 67: Deposit in Court.

By leave of court, a party may deposit with the court all or any part of a sum of money or any other thing capable of delivery which is involved in the action. Under WIS. STAT. (1937) § 269.06, the court may order a party to deposit in court or to deliver to another party money or any other thing capable of delivery.

Rule 68: Offer of Judgment.

At any time more than ten days before the beginning of trial, a party may serve an offer to allow judgment to the effect specified in offer, with costs then accrued. If the offer is not accepted within ten days it shall be deemed withdrawn. If the adverse party fails to obtain a judgment more favorable than that offered, he shall not recover costs from the time of the offer but shall pay costs from such time.

Substantially the same provisions are contained in WIS. STAT. (1937) §§ 269.02-269.04.

Rule 69: Execution.

The procedure on execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. The judgment creditor may examine any person including the judgment debtor in the manner provided in these rules for taking depositions or in the manner provided by the practice of the state in which the district court is held.

Statutes of the United States relating to execution are listed in the notes of the Advisory Committee. The practice in Wisconsin relating to executions is covered by WIS. STAT. (1937) c. 272.

Rule 70: Judgment for Specific Acts; Vesting Title.

If a party fails to comply with a judgment directing him to execute a conveyance of land, to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done by some other person at the cost of the disobedient party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party. In proper cases, the court may adjudge the party in contempt. If real or personal property is within the district, the court in lieu of directing a conveyance may enter a judgment divesting the title of any party and vesting it in others. When any order or judgment is for the delivery of possession, the party in whose favor it is entered may obtain a writ of execution or assistance from the clerk.

This rule embodies the provisions of Equity Rules 7, 8 and 9. The old and new denominations for attachment (sequestration) and execution (assistance) are used in this rule to avoid confusion.

Rule 71: Process in Behalf of and Against Persons Not Parties.

An order in favor of a person not a party to an action or which may lawfully be enforced against a person who is not a party, may be enforced by the same process as if such person were a party.

This rule is virtually identical with Equity Rule 11.

IX. APPEALS

The Federal Rules of Civil Procedure are not intended to include rules for the appellate courts. In connection with appeals, however, certain initial acts must be done while the case is in the district court. This section is directed at simplification of such initial acts.

Rule 72: Appeal from a District Court to the Supreme Court.

A direct appeal from the district court to the Supreme Court is taken by petition for appeal accompanied by an assignment of errors. The present laws and rules of the Supreme Court govern such appeal.

Rule 73: Appeal to a Circuit Court of Appeals.

An appeal from a district court to a circuit court of appeals is taken by filing a notice of appeal with the clerk of the district court. This is the only step in the proceedings which is jurisdictional. The remedy for failure properly to do the remaining acts necessary for the appeal is provided in these rules, or where not so provided may be specified by the appellate court. The notice of appeal supplants the petition for appeal, order allowing appeal, and citation on appeal. This rule continues in effect the time for taking an appeal (three months from the date of entry of the judgment or decree).

The notice of appeal shall specify the parties taking the appeal, shall designate the judgment or part thereof appealed from and shall name the court to which the appeal is taken. Notification of the filing of the notice of appeal is given to the other parties by the clerk of the district court. If a bond for costs on appeal is required, the bond shall be filed with the notice of appeal. If an appellant who is entitled thereto desires a stay on appeal, he may present to the court for its approval a supersedeas bond. The liability of the sureties on an appeal or supersedeas bond may be enforced on motion without an independent action.

Rule 74: Joint or Several Appeals to the Supreme Court or to a Circuit Court of Appeals; Summons and Severance Abolished.

This rule abolishes formal summons and severance in separate appeals from a joint or several judgment.

Rule 75: Record on Appeal to a Circuit Court of Appeals.

This rule prescribes the form and contents of the record on appeal. The appellant designates the portions of the trial record to be contained in the record on appeal. Within ten days after service of such designation, any other party may serve and file a designation of additional portions of the record, proceedings, and evidence which he desires to have included in the record on appeal.

Testimony of witnesses designated for inclusion in the record on appeal need not be in narrative form but may be in question and answer form. If the appellant uses the narrative form, the appellee may demand substitution of questions and answers for all or part thereof. For unnecessary substitution, the appellate court may withhold costs or may impose costs on offending attorneys or parties.

If the appellant chooses to omit part of the record, he must serve a concise statement of the points on which he intends to rely on the appeal. The statement of points supplants the assignment of error. Instead of serving such designations the parties may stipulate as to what portions of the record, proceedings and evidence are to be included in the record on appeal.

The clerk of the district court shall transmit to the appellate court a copy of the matter designated by the parties which must include the items listed in this rule (pleadings, verdict, findings, etc.). It is not necessary for the record on appeal to be approved by the district court, but if any difference arises it shall be submitted to and settled by the court. The parties by stipulation or the court may correct errors or omissions in the record.

Printing of the record on appeal shall be as prescribed in the rules of the court to which the appeal is taken, but shall conform to the rules of the Supreme Court.

Rule 76: Record on Appeal to a Circuit Court of Appeals; Agreed Statement.

When the questions presented by an appeal can be determined without an examination of all the pleadings, evidence and proceedings, the parties may prepare and sign a statement showing how the questions arose and were decided in the district court, setting forth only so many of the facts as are essential to a decision, and including a copy of the judgment appealed from, the notice of appeal, and a statement of the points to be relied on by the appellant. If the agreed statement conforms to the truth, it shall be approved by the district court and certified to the appellate court. The district court may make such additions as it considers necessary.

This rule is substantially the same as Equity Rule 77.

X. District Courts and Clerks

Rule 77: District Courts and Clerks.

This rule relates to the time when the court and clerk's office shall be open, the places where trials and hearings may be conducted, the issuance of process and entering of judgments by the clerk and the giving of notice of entry of orders and judgments by the clerk, and is substantially the same as Equity Rules 1, 2, 4 and 5.

Rule 78: Motion Day.

Unless local conditions make it impracticable, each district court shall establish regular times and places at which motions may be heard.

The court may provide by rule or order for the determination of motions on briefs.

This rule is similar to Equity Rule 6 but gives the court greater latitude.

Rule 79: Books Kept by the Clerk and Entries Therein.

This rule prescribes the duties of the clerk relative to keeping a civil docket and civil order book and similar matters. It is essentially a revision of Equity Rule 3 to conform to the new rules.

Rule 80: Stenographer; Stenographic Report or Transcript as Evidence.

The court or a master may direct that evidence be taken stenographically and may appoint a stenographer for that purpose. The stenographer's fees shall be fixed by the court and may be taxed as costs. This rule is an elaboration of Equity Rule 50.

XI. General Provisions

Rule 81: Applicability in General.

These rules do not apply to proceedings in admiralty, bankruptcy or copyright, except in so far as they may be made applicable by rules promulgated by the Supreme Court. The Advisory Committee recommended to the Supreme Court that the application of the Federal Rules of Civil Procedure be extended to include bankruptcy and copyright proceedings. The Supreme Court has been authorized to make rules governing the practice and procedure in such cases. The Committee is of the opinion that the order which it recommended will probably be made.

In the following proceedings, these rules apply only to appeals: admission to citizenship, habeas corpus, quo warranto, forfeiture of property for violation of a statute of the United States, arbitration, proceedings relating to boards of arbitration of railway labor disputes or for condemnation of property under the power of eminent domain, and probate, adoption, or lunacy proceedings in the district court for the District of Columbia.

The method for instituting proceedings to review orders of the Secretary of Agriculture, the Secretary of Commerce, and the Petroleum Control Boards, or for conducting proceedings to enforce orders of the National Labor Relations Board, are not altered, but the practice in the district courts shall conform to these rules so far as possible.

These rules do not apply to proceedings relating to deportation of Chinese or for a review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act.

The writs of scire facias and mandamus are abolished. Relief formerly available under these writs may be obtained by motion or other appropriate action.

These rules apply to civil actions removed to the district courts of the United States from the state courts and govern all proceedings after removal. If, at the time of removal, all necessary pleadings have been filed, a party entitled to trial by jury who has not already waived such right must demand a jury trial within ten days after the record of the action is filed in the district court or waive his right.

When the law of a state is referred to in these rules the word "law" includes the statutes of that state and the judicial decisions construing them.

Rule 82: Jurisdiction and Venue Unaffected.

"These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of action therein."

Rule 83: Rules by District Courts.

Each district court may make rules governing its practice not inconsistent with these rules. Copies of such rules shall be furnished to the Supreme Court.

The intention here is to permit the district court to fill in the gaps wherever the new rules do not cover the situation.

Rule 84: Forms.

The suggested forms set out in an appendix to the rules are intended to serve as a guide in pleading. They are designed to indicate the simplicity and brevity which is considered desirable. It has been suggested that in some instances the model pleadings are so brief as to amount to pleading conclusions of law rather than ultimate facts. The pleader is not required to follow these forms, but should remember that the Advisory Committee considers them adequate.

Rule 85: Title.

"These rules may be known and cited as the Federal Rules of Civil Procedure."

Rule 86: Effective Date.

These rules became effective on September 16, 1938. They govern all proceedings in actions brought after that date. They are to be applied in all further proceedings in actions then pending, except to the extent that the court considers that their application would not be feasible or would work injustice.

REFERENCE TO WISCONSIN STATUTES*

Federal Rules of Civil Procedure	Wisconsin Statutes of 1937	Federal Rules of Civil Procedure	Wisconsin Statutes of 1937
2	260.08	12	263.06
3	262.01	12	263.13
3	330.39	12	263.32
3	330.40	12	263.42
4	262.02	12	263.43
4	262.05	12	263.44
4	262.07	13	263.14
4	262.08	13	263.15
4	262.09	14	260.19
4	262.12	14	260.20
5	269.34	15	263.28
5	269.37	15	263.45
5	260.42	15	263.46
6	252.10	15	263.47
6	269.31	15	269.44
6	269.36	15	269.52
6	269.45	17	260.13
7	263.02	17	260.15
7	263.05	17	260.21
7	263.06	17	260.22
7	263.19	18	263.04
7	263.20	18	278.04
7	269.27	19	260.12
7	269.32	19	260.19
8	263.03	20	260.10
8	263.13	20	260.11
8	263.16	20	260.18
8	263.26	22	260.19
8	263.27	23	260.12
9	263.13	24	260.19
9	263.33	25	269.13
9	263.34	25	269.14
10	269.03	25	260.15
10	269.33	25	260.16
11	263.23	25	260.18
11	263.24	26	269.57

*A similar table of references to the Equity Rules is included in the published copies of the Federal Rules of Civil Procedure.

26	326.05	50	270.26
26	326.12	51	270.21
26	326.07	52	270.33
26	326.13	53	270.34
26	326.14	53	270.35
26	326.15	54	270.54
26	326.16	54	270.57
27	326.27	54	271.01
27	326.28	55	270.62
27	326.29	56	270.635
28	326.09	57	269.56
28	325.01	58	270.31
28	326.01	58	270.65
30	326.09	59	270.49
30	326.10	60	269.46
34	269.57	61	260.43
36	327.22	62	270.79
38	270.07	64	c. 264
38	270.32	64	c. 265
39	270.07	64	c. 266
40	270.13	64	c. 267
41	270.24	65	c. 268
42	269.05	66	c. 268
42	270.08	68	269.02
43	325.14	68	269.03
44	327.18	68	269.04
45	325.01	69	c. 272
45	325.03	73	270.43-270.48
46	270.39	73	c. 274
47	270.15	73	270.43-270.48
47	270.16	73	274.11
49	270.27	75	270.43-270.48
49	270.28	76	270.43-270.48
49	270.30	81	293.01